The Utah Department of Transportation (UDOT) Disadvantaged Business Enterprise (DBE) Program

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Contents

Participation by Disadvantaged Business Enterprises

Background

Effective Date

Program Updates

Duration

Objectives

Definitions

Forbidden Discriminatory Actions

Information Collection and Reporting

Assurances

Policy Statement

Liaison Officer

DBE Financial Institutions

Prompt Payment

DBE Directory

Over-concentration of DBEs in Certain Types of work

Quotas and Set-asides

Business Development Program

Monitoring and Enforcement Mechanisms

Overall Goals

Contract Goals

Good Faith Efforts

Counting DBE Participation

Commercially Useful Function

DBE Trucking Firm Requirements

Joint Check Arrangements

UUCP Procedure for the DOT/SBA MOU

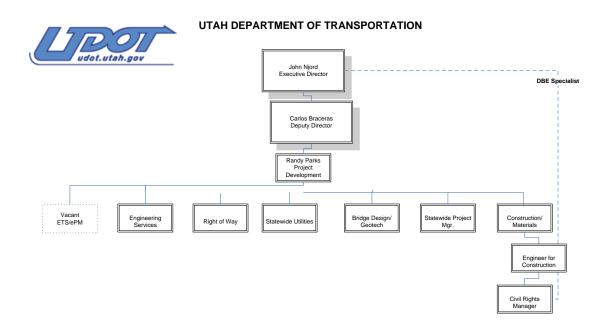
Certification

Monitoring Payments to DBEs

Reporting to DOT

Confidentiality

Attachments



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| — | Executive Director Signature | Date |

Revised Date: October 11, 2011

1. Participation by Disadvantaged Business Enterprises in The Utah Department of Transportation (UDOT) Programs

The Disadvantaged Business Enterprise (DBE) program is intended to remedy past and current discrimination against disadvantaged business enterprises, ensure a "level playing field" and foster equal opportunity in DOT-assisted contracts, improve the flexibility and efficiency of the DBE program, and reduce burdens on small businesses.

2. Background

The UDOT has the responsibility of ensuring that firms competing for DOT-assisted contracts are not disadvantaged by unlawful discrimination. The UDOT's most important tool for meeting this responsibility is its Disadvantaged Business Enterprise (DBE) program. This program began in 1980. Originally, the program was a minority/women's business enterprise program established by regulation under the authority of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes that apply to DOT financial assistance programs. See 49 CFR part 26.

3. Effective Date

The effective date of this Disadvantaged Business Enterprise Program is November 1, 2011.

4. Program Updates

The UDOT will provide to DOT updates representing significant changes in the DBE program.

5. Duration

The UDOT will continue to carry out this program until all funds from DOT financial assistance have been expended.

The UDOT receives Federal-aid highway funds, Federal transit funds, and Airport funds under the authorizations listed in 49 CFR Part 26.3, subparts (a) (1), (2), and (3). This program will endure for length of the appropriate authorization or until instructed to discontinue the DBE program by the Operating Administration.

6. Objectives (49 CFR 26.1)

This part seeks to achieve several objectives:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- 2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- 3. To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- 4. To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- To help remove barriers to the participation of DBEs in DOTassisted contracts;
- 6. To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- 7. To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

7. Definitions (49 CFR 26.5)

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

- (1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:
 - (i) One concern controls or has the power to control the other; or
 - (ii) A third party or parties controls or has the power to control both; or
 - (iii) An identity of interest between or among parties exists such that affiliation may be found.
- (2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

Compliance means that a recipient has correctly implemented the requirements of this part.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

Department or DOT means the U.S. Department of Transportation (USDOT or DOT), including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged Business Enterprise or DBE means a for-profit small business concern

- (1) At least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT means the United States Department of Transportation.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial

assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

General Contractor means a contracting firm which performs more than 25 percent of the firm's work outside of the defined specialty trade area.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

License Classifications means the classifications established by the Utah Code 58-55-4 and used by the Utah Department of Commerce, Division of Occupational and Professional Licensing.

NAICS means North American Industrial Classification System - replaces the Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm.

Native Hawaiian means any individual whose ancestors were natives, before 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Operating Administration or OA means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

Over-concentration means a construction classification in which DBE firms are used to the extent that non-DBE firms are unduly burdened and limited in their participation in this same type of work.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U. S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (www.ntis.gov/naics).

Primary recipient means a recipient which DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

Ready, willing, and able means, for the purpose of setting annual DBE goals, in the context of a DBE or non-DBE business, that it has the necessary license, qualifications, expertise, equipment, facilities, and personnel to perform work on the UDOT's DOT-assisted contracts. The firm must be registered with the UDOT and must have demonstrated a willingness to perform work on DOT-assisted contracts by submitting a bid, proposal, or quotation as a prospective prime contractor, subcontractor, supplier, trucker consultant, or other relevant business entity within the last two Federal fiscal years. Able, for purposes of this definition, includes the ability to compete.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or SBA means the United States Small Business Administration.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR 26.65, (b).

Specialty Contractor means a person or firm licensed under Utah Code 58-56-4 under a specialty contractor classification. For purposes of this DBE program only and for determining if the specialty contractor is a small business, a construction contracting firm that performs highway construction work (usually as a subcontractor) which involves one or more minor contract items each amounting to less than 10 percent of the total project cost. Work items performed by specialty contractors include, but are not limited to: fence erection, guardrail installation; traffic control and

pavement marking, seeding, mulching and landscaping, electrical work, drainage, incidental concrete work (sidewalks, curbs and gutters, trucking, and etc.)

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is --

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - (vi) Women; and
 - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

8. Forbidden Discriminatory Actions (49 CFR 26.7)

- 1. The UDOT, any contractor, any subcontractor, or any supplier shall not exclude any person from participation in, deny any person the benefits of, nor otherwise discriminate against anyone in connection with the award and performance of any contract on the basis of race, color, sex, or national origin.
- In administering its DBE program, the UDOT shall not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

9. Information Collection and Reporting (49 CFR 26.11)

- 1. The UDOT will provide data about its DBE program to the Department as directed by DOT operating administrations.
- 2. The UDOT will create and maintain a bidders list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. For every firm the following information will be included:
 - a. Firm name;
 - b. Firm address;
 - c. Firm's status as a DBE or non-DBE;
 - d. The age of the firm;
 - e. The annual gross receipts of the firm; and
 - f. Work classifications.
- 3. The UDOT will require all firms to register annually (beginning May 1st) on-line (http://www.udot.utah.gov/index.php/m=c/tid=317), by completing the "Bidders Registration Form." A contract will not be awarded or a lower tier subcontract at any level will not be approved unless or until the contractor has registered the necessary information with UDOT.

4. The UDOT requires all prime bidders to submit the bidders list (all subcontract and/or supplier information) at the time of bid opening.

10. Assurances (49 CFR 26.13)

 Each financial assistance agreement the UDOT signs with a DOT operating administration (or a primary recipient) will include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

2. Each contract the UDOT signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the UDOT deems appropriate.

11. Policy Statement (49 CFR 26.23)

It is the policy of the UDOT that DBEs, as defined in 49 CFR Part 26, and other small businesses shall have the maximum feasible opportunity to participate in contracts financed in whole or in part with public funds. Consistent with this policy, the UDOT will not allow any person or business to be excluded from

participation in, denied the benefits of, or otherwise be discriminated against in connection with the award and performance of any DOT-assisted contract because of sex, race, religion, or national origin. The UDOT has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the DOT, 49 CFR Part 26.

Implementation of the DBE program has the same priority as compliance with all other legal obligations incurred by the UDOT in its financial assistance agreements with the DOT.

The Policy Statement expresses the UDOT's commitment to the DBE program, states the Program objectives, and outlines responsibilities for Program implementation. The UDOT will circulate the Policy Statement throughout its organization and to the DBE and non-DBE business communities that perform work on its DOT-assisted contracts.

The UDOT will disseminate this policy statement to the Commission and all the components of its organization. The UDOT will distribute this statement to DBE and non-DBE business communities that perform work on DOT-assisted contracts. The Policy Statement is a part of the DBE Special Provision and is distributed to every potential contractor, subcontractor, supplier, or service provider that examines the specifications and bidding documents on DOT-assisted projects.

12. Liaison Officer (CFR 26.25)

The DBE liaison officer is the Civil Rights Manager, who has direct and independent access to the Executive Director concerning DBE program matters.

 The address of the Civil Rights Manager is: Utah Department of Transportation Civil Rights Office 4501 South 2700 West Box 141520 Salt Lake City, UT 84114-1520

The phone number of the Civil Rights Office is (801) 965-4695

The Fax number of the Civil Rights Office is (801) 965-4101

The Civil Rights Manager shall be responsible for implementing all aspects of The UDOT's DBE program and ensuring that the UDOT complies with all provisions of 49 CFR Part 26. The UDOT will have adequate staff to administer the program in compliance with this part. The resources available are:

- a. The Civil Rights Manager has a staff of two (2) professional employees assigned to the DBE program on a full-time basis.
- b. There are four Regions in the UDOT. Each Region has at least one Contract Specialist. These Contract Specialists devote a portion of their time monitoring the DBE Program.
- c. The Resident Engineer or the Consulting Engineer is responsible to enforce the specifications of the project.
- d. Duties and responsibilities of the Civil Rights Office include the following:
 - Gather and report statistical data and other information as required by DOT;
 - Review third party contracts and purchase requisitions for compliance with this program;
 - 3) Work with all departments to set overall annual goals;
 - 4) Ensure that bid notices and requests for proposals are available to DBEs in a timely manner;
 - 5) Identify contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitor the results;
 - 6) Analyze the UDOT's progress toward goal attainment and identify ways to improve progress;
 - 7) Participate in pre-bid meetings;
 - 8) Advise the Executive Director, Deputy Director, Engineer for Construction and other managers on DBE matters and achievements;
 - Participate with the Director for Construction and Materials and/or his designee(s) to determine contractor compliance with good faith efforts;
 - 10) Provide DBEs with information and assistance in preparing bids, obtaining bonding and insurance;

- 11) Plan and participate in DBE training seminars;
- 12) Act as liaison to the Uniform Certification Process in Utah;
- 13) Certify DBEs according to the criteria set by DOT and ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
- 14) Provide outreach to DBEs and community organizations to advise them of opportunities;
- 15) Maintain the UDOT's updated directory on certified DBEs:
- 16) Ensure that the DBE Program is narrowly tailored in accordance with applicable law;
- 17) To help remove barriers to the participation of DBEs in DOT assisted contracts; and
- 18) To assist the development of firms that can compete successfully in the marketplace outside the DBE Program.

13. DBE Financial Institutions (49 CFR 26.27)

The UDOT will thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in its community and make reasonable efforts to use these institutions. The UDOT will encourage prime contractors to use such institutions.

The UDOT has contacted the Division of Financial Institutions to determine the firms that may be owned and controlled by minorities and women. Only State chartered financial institutions were evaluated. It was determined that Federally chartered financial institutions would not meet the ownership and control criteria. No full service DBE financial institution has been identified. One financial institution has a minority president; however, the CEO is a non-minority. One mortgage institution which is woman owned and controlled has been identified. The mortgage company does not provide the kinds of financial services that are used in the construction industry. The UDOT has not identified any full service DBE Financial Institutions that are owned and controlled by socially and economically disadvantaged individuals.

14. Prompt Payment (49 CFR 26.29, UDOT Standard Specifications Section 01284)

See Attached

(1.4) DEFINITIONS

- A. 1st Tier Subcontract: The first tier subcontract awarded per subcontractor as a 1st tier subcontractor under the Prime Contractor. Credit for the incentive is based on the 1st subcontract awarded as a 1st tier. Multiple subcontracts for the same 1st tier subcontract are not counted towards the incentive.
- B. Proof of payment: Confirmation from the subcontractor that payment (funds) has been received.
- C. Working days: Considered a five day work week, Monday thru Friday, for the purpose only associated with this specification.
- D. Pay subcontractors for satisfactory performance of sublet work, no later than 10 working days after the receipt of payment by the Department.
 - 1. Enter all subcontractor payments into PDBS Subcontractor (Payment Screen within 10 working days of the receipt of payment by the Department. Date entered should reflect actual date payment was sent to the subcontractor.
 - 2. Entry of payments into PDBS is a Prompt Payment Affidavit.

 Actual date of entry is tied to the date the pay estimate is processed by the Comptroller. If the entry date exceeds 15 working days from the Comptroller date, the entry will flag red, indicating non-compliance with the Prompt Payment Provision.
- E. Include a clause in the subcontract, service, or purchase agreement language agreeing to pay money retained for subcontract, service, or purchase agreement upon satisfactory completion of the work and acceptance by the Department. Process all subcontractor retention payment with the pay estimate after Department's acceptance.
 - 1. The prime contractor is considered out of compliance if no payment is made to the subcontractor and there are no notes in the comments section indicating why the subcontractor's payment is being rightfully withheld.
- F. The Engineer will provide written notification to the Contractor upon determination by the Department of failure to make prompt payment. Resolve the failure and make prompt payment within three working days.

- G. Failure to resolve prompt payment results in the assessment of \$250 per each working day, per violation, per subcontractor, commencing from the date of the written notification until proof of payment is received.
- H. The Department considers the failure to make prompt payment an indication of a lack of financial fitness. The following additional measures may be imposed as necessary:
 - 1. Forfeit the privilege of bidding on Department projects until payment covered by this Section is made.
 - 2. Forfeit the privilege of having a subcontract, supply or purchase agreement approved to perform work for supply material on Department projects until payment covered by this Section is made.
- I. The Department employs other mechanisms consistent with this Section and applicable state and local law so payment is fully and promptly made.
- J. The prime contractor will be paid a onetime payment of \$250 for each 1st tier subcontract entered into the PDBS provided the following criteria are met:
 - 1. Subcontractor worked on the project.
 - 2. All prompt payments for all subcontractors who worked on the project are entered into PDBS Subcontractor Payment Screen within ten working days after payment to the prime contractor is received from the Department.

15. DBE Directory (49 CFR 26.31)

The UDOT will maintain and make available to interested persons a DBE directory identifying all firms eligible to participate as DBEs. The UDOT will include for each firm listed the name of the firm, primary contact person, address, phone number and the types of work the firm has been certified to perform as a DBE.

The UDOT will revise its directory at least annually and make updated information available to contractors upon request. The DBE Directory will be available by writing to:

Utah Department of Transportation Civil Rights Office 4501 South 2700 West Box 141520 Salt Lake City, UT 84114-1520

16. Over-concentration of DBEs in Certain Types of Work (49 CFR 26.33)

- 1. The UDOT has not identified any areas of over concentration.
- 2. If DBE firms are so over concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, the UDOT will devise appropriate measures to address this over concentration.
- 3. The UDOT may also consider varying the use of contract goals, to the extent consistent with 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts
- 4. Some measures to help DBEs expand their work classification and grow their business may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of their specific field.

17. Quotas and Set-asides (49 CFR 26.43)

- 1. The UDOT shall not use quotas in any way in the administration of its DBE Program.
- 2. The UDOT shall not set-aside contracts for DBEs in the administration of its DBE Program.

18. Business Development Programs (49 CFR 26.35)

The UDOT has not implemented a Business Development Program. If a Business Development Program is developed, it will comply with 25.53, Appendix C and Appendix D to Part 26.

19. Monitoring and Enforcement Mechanisms (49 CFR 26.37)

Monitoring and enforcing the DBE program has the same priority as compliance with all other legal obligations and project specifications.

The Civil Rights Manager and the Civil Rights Office staff shall have access to the project site to monitor DBE participation and performance. The Civil Rights Office shall have the right to audit the prime contractor and DBE subcontractors and suppliers to ensure the performance of a commercially useful function and that work committed to DBEs at contract award is actually performed by DBEs.

Upon award of a contract with race conscious DBE goals, the DBE participation becomes a contract specification. The Resident Engineer or the Consultant Engineer is responsible for enforcing the contract specifications...

Race neutral participation does not become a contract specification. However, the race neutral DBE performance will be monitored. If a DBE does not perform a commercially useful function, the DBE's participation will not count toward fulfilling race neutral DBE participation toward achievement of the UDOT's annual overall goal.

The UDOT will monitor actual DBE attainments and have a means of comparing these attainments to commitments.

The UDOT will ensure compliance with the part's requirements by all program recipients through the application of contract remedies under Federal, state, and local law.

The UDOT will bring to the attention of the DOT any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109. The UDOT will also consider similar action under its own legal authorities.

The UDOT relies upon the regulations, provisions, and contract remedies available in the Special Provisions (attached) in the event of non-compliance with the DBE regulation by a participant in procurement activities.

20. Overall Goals (49 CFR 26.45)(Section 26.45 (f) (1).

Annual goals for FHWA, FTA, and FAA are to be submitted on August 1 of each year, provided they meet the DBE threshold requirements.

To ensure that the DBE program continues to be narrowly tailored to overcome the effects of discrimination, the UDOT must adjust the use of contract goals as follows:

If during the course of any year it is determined that the overall goal will be exceeded, the UDOT will reduce or eliminate the use contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal.

If it is determined that the UDOT will fall short of its overall goal, then appropriate modifications in the use of race neutral and/or race conscious measures will be made to allow the UDOT to meet the overall goal.

21. Contract Goals (49 CFR 26.51)

The UDOT will use contract DBE goals to meet any portion of the overall DBE goal that it does not project being able to meet by using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting the UDOT's overall goal.

The UDOT will establish contract DBE goals only on those DOT-assisted contracts that have DBE subcontracting possibilities. The UDOT may not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work, etc.)

The UDOT will express its contract DBE goals as a percentage of the Federal share of a DOT-assisted contract.

The UDOT does not intend to use any race-conscious means of obtaining DBE participation other than contract goals.

22. Good Faith Efforts (49 CFR 26.53)

Demonstration of good faith efforts

The UDOT treats bidders' compliance with good faith efforts requirements as a matter of responsiveness at bid opening. The bidder can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in 49 CFR Appendix A to part 26.

Each solicitation for which a contract goal has been established will require a bidder to submit the following information.

1. Documentation of commitment to use a DBE subcontractor(s) to meet the set goal.

Documentation to be submitted at time of bid:

- (a) The name and address of DBE firms that will participate as subcontractors in the contract.
- (b) A description of the work that each DBE will perform.
- (c) The dollar amount of the participation of each DBE firm.

Documentation to be submitted within three days of bid:

(a) To validate the DBE commitment(s), within three (3) days after the bid opening, the responsive low bidder must submit to the Civil Rights Staff written and signed confirmation from the DBE that the DBE is participating in the contract as provided in the prime contractor's commitment. This document must include a description of the work, unit prices, and the dollar amounts.

- 2. At time of bid, if the bidder does not have enough DBE participation to meet the set goal, then evidence of good faith efforts must be submitted with the bid which would include:
 - (a) Documentation on bid solicitation to DBEs and Non DBEs.
 - (b) Documentation on the response from the solicited bidder(s).
 - (c) Bidder(s) bid prices.
 - (d) Quote comparisons for each bidder by line item.
 - (e) Statement explaining why the DBE was not used to meet the goal.

On a bid with a race neutral goal (0%), the bidder is encouraged to consider equal opportunity action to allow DBEs to compete for and perform on subcontracts. Contacts that have been made with all firms regarding potential work to be subcontracted are to be submitted with the EBS prepared Bid Proposal in the Bidders List.

Documentation to be submitted at time of bid:

- (a) Documentation on bid solicitation to DBEs and Non DBEs.
- (b) Documentation on the response from the solicited bidder(s).

Documentation to be submitted within three days of bid:

(a) If the bidder uses a DBE, to validate the DBE commitment(s), within three (3) days after the bid opening, the low bidder must submit to the Civil Rights Staff written and signed confirmation from the DBE that the DBE is participating in the contract as provided in the prime contractor's commitment. This document must include a description of the work, unit prices, and the dollar amounts.

Evaluation of Good Faith Efforts

The UDOT Civil Rights staff is responsible for determining whether a bidder who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive. The UDOT will ensure that all information is complete, accurate, and adequately documents the bidder's good faith efforts before awarding the contract to the bidder.

If the UDOT determines that the bidder did not make adequate good faith efforts to meet the contract goal, within two days of bid opening, the UDOT will notify the bidder in writing that they were non-responsive.

Administrative reconsideration

The bidder, within seven calendar days of the date of receipt of the letter from the UDOT stating they were non-responsive, may request in writing to meet in

person with the reconsideration official to discuss and provide written clarification or arguments concerning whether it met the goal or made adequate good faith efforts.

A bidder should make this request in writing to the Director for Construction and Materials (Reconsideration Official):

Utah Department of Transportation Director for Construction and Materials 4501 South 2700 West, Box 8220 Salt Lake City, Utah 84114-1520

Phone Number (801) 965-4111 Fax Number (801) 965-4101

After this meeting, the UDOT will send the bidder a written decision on reconsideration and explain the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

The result of the reconsideration process is not administratively appealable to the USDOT.

Good Faith Efforts when a DBE is replaced on a contract

The UDOT shall require that a prime contractor not terminate a DBE subcontractor who is under contract to fulfill DBE goals on a project without the prior written consent of the Civil Rights Manager. The UDOT will require the prime contractor to:

- 1. Notify the Civil Rights Manager in writing
- 2. Provide reasonable documentation
- 3. Provide a written release from the DBE
- 4. If approved, the prime contractor will obtain the approval of the substitute DBE from the Civil Rights Manager. If the prime contractor could not find a substitute DBE, the prime contractor will provide documentation of good faith efforts.
- Unauthorized substitutions may result in sanctions of nonpayment for the work involved.

23. Counting DBE Participation (49 CFR 26.55)

In accordance with 49 CFR 26.55, the UDOT will count DBE participation toward overall and contract goals as follows:

- 1. When a DBE participates in the contract, only the value of the work actually performed will be counted.
- 2. If a firm is not currently certified as a DBE in accordance with the program, at the time of the due date for bids or offers of the contract, the firm's participation toward any DBE goals will not be counted, except as provided for in 49 CFR 26.87(i)
- 3. The dollar value of the work performed under a contract with a firm after it has ceased to be certified will not be counted toward the overall goal.
- 4. The participation of a DBE subcontractor toward the contractor's DBE overall goal will not be counted until the amount being counted toward the goal has been paid to the DBE.
 - a. The entire amount of the portion of a construction contract (or other contract not covered by 49 CFR 26.55 (a)(2) that is performed by the DBE's own forces). Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies, and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
 - b. The entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, count toward DBE goals, provided that the UDOT determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - c. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontract work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm will not count toward DBE goals.
 - d. When a DBE performs as participant in a joint venture, the UDOT will count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
 - e. The UDOT will count expenditures of a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

Commercially Useful Function (CUF)

1. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To

perform a commercially useful function the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the materials and installing (where applicable) and paying for the material itself. to determine whether a DBE is performing a commercially useful function, the UDOT will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and DBE credit claimed for its performance of the work, and other relevant factors;

- 2. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which the funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, similar transactions must be examined, particularly those in which DBEs do not participate;
- 3. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the UDOT will presume that it is not performing a commercially useful function;
- 4. When a DBE is presumed not to be performing a commercially useful function as provided in this program, the DBE may present evidence to rebut this presumption. It may be determined that the firm is performing a commercially useful function given the type of work involved and normal industry practices;
- 5. The UDOT's decisions on matters of whether a DBE performs a commercially useful function are subject to review by the concerned operating administration, but is not subject to an administrative appeal to USDOT.
- 6. The UDOT will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
 - a. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals;
 - b. The DBE must itself own and operate at least one fully licensed, insured, and operational truck, which must be used on the project at all times;

- The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures and operates using drivers it employs;
- d. The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract;
- e. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of the transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement; and
- f. For purposes of this section, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for the use of the leased truck. Leased trucks must display the name and identification number of the DBE.
- 7. The UDOT will count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
 - a. 100% of the cost of the materials or supplies toward DBE goals if the materials or supplies are obtained from a DBE manufacturer. For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described in the specifications.
 - b. The UDOT will count 60% of the cost of the materials or supplies toward DBE goals if the materials or supplies are purchased from a DBE regular dealer. For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold to or leased to the public in the usual course of business; and
 - c. To be a regular dealer the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question;
 - d. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning

- operating or maintaining a place of business as provided in 49 CFR 26.55 (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease and not an ad hoc or contract-by-contract basis;
- e. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of 49 CFR 26.55(e)(2); and
- f. The UDOT does not allow drop shipments. Materials and supplies obtained from a DBE regular dealer that are drop-shipped to a project site will not be counted toward DBE goals.
- 8. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, the UDOT will count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided that the UDOT has determined the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services rendered, and that the DBE has been certified by the UDOT as a broker for such services. However, the UDOT will not count any portion of the cost of the materials and supplies themselves toward DBE goals.
- 9. A DBE obtaining items for a construction contract normally should install them as well. If the DBE obtains the items but the prime contractor or another party installs them, the DBE credit awarded may be limited to the fee or commission obtained by the DBE.
- 10. In order to track DBE payments, there must be a subcontract agreement between the DBE and the prime contractor. All DBEs working on a project must have a subcontract in place to include DBE suppliers or trucking firms.

DBE Trucking Firm Requirements

In accordance with 49 CFR Part 26, the UDOT will use the following to determine whether a firm is eligible to be counted as a DBE trucking firm, a DBE truck broker, or a regular dealer. It is the responsibility of the prime contractor and the DBE trucking firm to ensure the following requirements are met on all UDOT projects.

- 1. DBE trucking firms must comply with all Utah Trucking Regulations, UDOT Standard Specifications, and contract provisions.
- 2. DBE trucking firms must own at least one fully operational truck that is used on the contract.

- 3. DBE trucking firms may lease additional trucks, except from (prime) contractors for whom they are doing work to fulfill a DBE goal. Valid lease agreements must be submitted to the UDOT as part of the certification process. A valid lease agreement must include the following:
 - a. An agreement for payment;
 - Designate the DBE as the person controlling the workflow of the equipment;
 - c. Driver must be on the DBE's payroll; and
 - d. The DBE trucking firm must be responsible for fuel, maintenance, insurance, payment of salary, and benefits to the drivers, if applicable.
- 4. The DBE trucking firm must control the management aspects such as scheduling.
- 5. Trucks owned or leased by DBE trucking firms must be placarded with the DBE Trucking firm's logo.
- 6. The financial risk that is assumed by the DBE trucking firm must be real and substantial. The haul slips must be issued in the name of the DBE trucking firm. All DBE trucking firms must keep full and accurate records, including operating expenses, operating revenue, miles operated, and payroll information as may be required by the UDOT Civil Rights office.

7. COUNTING DBE PARTICIPATION

A certified DBE trucking firm will be given DBE participation credit only for the work performed using the firm's own resources, as approved in their certification. When a certified DBE trucking firm performs as a regular dealer of bulk items listed in (7) above, the UDOT will count 60% of the cost of the bulk items toward the DBE goal and 100% of the value of the transportation services toward the DBE goal. If the DBE trucking firm's performance on the contract is limited to transporting the bulk items, the UDOT will count only the trucking portion of the contract at 100%. The UDOT does not allow drop shipments to a project site and no DBE credit will be given toward a goal for drop shipments of materials or supplies.

a. The UDOT will allow for a match, one to one, of DBE trucks and non-DBE subcontracted or leased trucks to be applied credit towards the DBE goal. Additional participation by non-DBE trucks over and above the match receives credit only for the commission fees.

Joint Check Arrangements

It is not the practice of the UDOT to allow the indiscriminate use of joint check arrangements or agreements. Joint check arrangements will be reviewed on a case-by case basis and <u>must</u> be approved in advance by the UDOT.

A joint check is defined as a check issued by a prime contractor to a DBE subcontractor and to a material supplier or another third party for items or services to be incorporated into a project.

The UDOT recognizes that prime contractors, subcontractors and suppliers may wish to use joint check arrangements for a variety of possible legitimate reasons, such as assuring that timely payment will be made for the supplier's items or deal with situations in which it is difficult for a subcontractor to obtain bonding at a competitive rate. However, the UDOT also understands that the use of joint checks can raise questions about whether it is proper to count DBE credit for the items purchased using the joint check and about whether the DBE firm's relationship with the prime contractor compromises the independence required for certification as a DBE.

To receive DBE credit for performing a commercially useful function with respect to obtain materials and supplies, a DBE must be responsible for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. Only when a DBE meets all requirements of this provision should DBE credit be counted for the procurement of items by the DBE. The use of joint checks can raise the question of whether the DBE's own funds, as distinct from those of the prime contractor, are really being used to pay for the material.

A prime contractor and DBE should provide documentation showing that the funds used to pay a supplier in fact came from the DBE's own funds. Accounts receivable to the DBE from the prime contractor for the costs of items procured by the DBE from the supplier generally may be regarded as representing the DBE's own funds. If a DBE which has received a joint check from the prime contractor documents that it has been in control of the funds provided in the check and has determined when the supplier or other third party has fulfilled its responsibilities under the contract, it is concluded, absent evidence to the contrary, that the DBE is paying the third party with its own funds.

The UDOT will require a written joint check agreement among the parties (including the suppliers concerned) providing full and prompt disclosure of the expected use of joint checks before deciding whether to give DBE credit for the items in question. The agreement will contain the parties' obligations and consequences or remedies if the agreement is not fulfilled or a breach occurs. The UDOT will determine whether the requirements of 26.55 (c)(1) other than payment from the DBE's own funds are being met. If the other requirements of 26.55 (c)(1) are not met, then DBE credit will not be awarded for the items in question.

Joint checks issued by the prime contractor must be delivered or mailed to the DBE for presentment and payment to the DBE's suppliers. The prime contractor should not make payment directly to the supplier.

The UDOT will review as required, as part of its monitoring process, invoices, cancelled checks, and or certification statements of payment.

24. DBE Certification (49 CFR 26.61 – 26.91)

Unified Certification Program

The Utah Unified Certification Program has been established and approved by the USDOT.

UTAH UNIFIED CERTIFICATION PROGRAM (UUCP) OPERATING PROCEDURES Section I. Organization of UUCP

A. Purpose. This document is intended to (a) eliminate duplication of tasks to DBE's and all recipients, (b) comply with CFR 49 Part 26, and (c) provide "one stop shopping" for all DBE applicants seeking certification in Utah through a collaborative program operated jointly by three entities.

This Operating Procedures document is a living document that is intended to facilitate the certifying entity's understanding of the day-to-day operation of the UUCP. This document is not a contract, nor incorporated in the Agreement. This document will not be construed in a manner that supersedes the Agreement. The certifying entities recognize that the DBE compliance officers do not have apparent or actual authority to bind their respective entities to a contract. This document does not create a cause of action in the event that a certifying entity does not follow, or is alleged not to have followed, these Operating Procedures.

B. Definitions. As used in these Operating Procedures:

"Agreement" means the Agreement Establishing Utah Unified Certification Program for the Disadvantaged Business Enterprises, dated March 5, 2002.

"Certifying entity" means one of the entities authorized under the Agreement to certify DBE firms in the State of Utah.

"UUCP" means the Utah Unified Certification Program established under the Agreement.

C. UUCP Agreement.

There is only one Uniform Certification Program in the State of Utah; the Utah Unified Certification Program (UUCP). The UUCP is a collaborative program operated by three DOT-funded recipients, including the Utah Transit Authority

(UTA), Utah Department of Transportation (UDOT) and the Salt Lake City Department of Airports (SLCDA).

Two DOT recipients are signatories to the UUCP inter-local agreement, but are non-certifying recipients; Logan City Transit and Park City Corporation. The UDOT administers funds for other local entities, and obligates them to follow the UUCP by an agreement entered at the time of reviewing the grant. There are no sub-recipients to the UUCP that are certifying agencies.

The UUCP is empowered to perform work and act as a collaborative program for the State of Utah under the terms of the Agreement. As a collaborative program authorized by the Agreement, the three entities use their established DBE programs to certify DBEs on behalf of all recipients in the State of Utah. All certification actions under this UUCP shall be binding on all USDOT recipients in the State of Utah through the Agreement, and through sub-agreements as other entities receive federal funding through these recipients.

There is only one UCP within the state of Utah; the Utah Unified Certification Program (UUCP). All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs. In the State of Utah, the UUCP will meet and comply with the obligations 49 CFR Part 26. Within the State of Utah, all recipients must use the UUCP with respect to certification and nondiscrimination.

D. Resources.

(1) UUCP certifications are a collaborative effort between the three entities conducting certifications in the State of Utah. Under the Agreement, the three entities, UDOT, UTA, and SLCDA, will use their combined resources and staff, budget for anticipated costs and cooperate to achieve efficiencies, to carry out the UUCP objectives.

The UUCP has five coordinators / administrators to implement the program for the State of Utah:

- The UDOT provides two full-time DBE Coordinators and one administrator.
- The UTA provides one full-time DBE Liaison Officer and administrative support to the Liaison Officer.
- The SLCDA provides one full-time DBE Liaison Officer.

The UUCP has and will continue to provide the financial and human resources adequate to meet the objectives of and implement the Utah Unified Certification Program. As set forth under the Agreement, the UDOT will perform the largest portion of the

administrative work of the UUCP by serving as the central point of contact for DBE applicants, by performing initial screenings of applications, and by maintaining the UUCP DBE directory.

(2) Titles and contact information:

UDOT Civil Rights Manager (801) 965-4695 UDOT Liason Official

UDOT DBE Coordinator

(801) 965-4208

DBE certification of construction and engineering-related applications, on-site reviews, DBE directory update, supportive services, and other duties as agreed.

UDOT DBE Coordinator

(801) 965-4102

DBE certification of construction and engineering-related applications, on-site reviews, Affidavit of No Change, and other duties as agreed.

UTA DBE Liaison Officer

(801) 262-5626 ext. 3537

DBE certification of transit-related construction, engineering, professional services, materials / manufacturers, on-site reviews, DBE directory update, Affidavits of No Change, and other duties as agreed.

UTA DBE Administrative Support (801) 287-3538

SLCDA DBE Liaison Officer

(801) 575-2945

DBE certification of Airport specific construction, engineering, professional services, materials / manufacturers, on-site reviews, DBE directory update, Affidavits of No Change, concession-related certifications, and other duties as agreed.

Section II. Operational Matters

A. Certification Procedures:

(1) **DBE Application**: The UUCP will use the approved DOT uniform application form (Uniform Certification Application DOT approved June 16, 2003 and effective July 16, 2003) along with a

supplemental questionnaire to capture additional vital information that is not on the DOT application form.

Each certifying entity will make the application available to the public upon request. The application may also be obtained by mail from:

Utah Department of Transportation Civil Rights Section/UUCP 4501 South 2700 West – 4th Floor Box 141520 Salt Lake City, Utah 84114-1520

The application may be obtained electronically by calling one of the certifying entities below for website information:

Utah Department of Transportation:

(801) 965-4100

Utah Transit Authority:

(801) 287-3537

Salt Lake City Department of Airports:

(801) 575-2945

The Application may also be obtained by contacting the Utah Business Development Centers (Procurement Technical Assistance Centers) (Ptechs).

Utah Department of Community & Economic Development Utah PTA Center (UPTAC) 324 South State Street, Suite 500, Salt Lake City, UT 84111 Phone: 801-538-8625, Fax: 801-538-8888

(2) **Application Information**. All recipients of USDOT funds, that have a webpage, will display instructions on how to apply for DBE certification on their Internet web pages. The mailing address for general inquiries of the UUCP and applications for DBE certification will be:

Utah Department of Transportation Civil Rights Section/UUCP 4501 South 2700 West – 4th Floor Box 141520 Salt Lake City, Utah 84114-1520 Any application inadvertently received by any one of the other certifying entities will be forwarded to the UDOT Civil Rights Section.

(3) Initial Evaluation of the Application.

- (a) The UDOT is the agency within the UUCP that will receive and screen all applications, and they will take the lead on dispersing the UUCP DBE applications by using the method(s) listed below.
- (b) When a UUCP DBE application is received, the UDOT will set up the applicant's information in its data base system, known as the "Project Development Business System" (PDBS), to begin tracking the DBE application.
- (4) Transferring the UUCP DBE application to the appropriate UUCP Entity.
 - (a) When a UUCP DBE Application is received, the UDOT will review the applicant's supplemental questionnaire to the UUCP application. The supplemental questionnaire allows the applicant to select whether their type of business would be most often used on airport specific work, general construction of highways, or public transit and related services. If multi-jurisdictional work categories were selected by the applicant that fell under the jurisdiction of two or more of the UUCP entities, the UDOT would determine which entity most often would use the type(s) of DBE work that the DBE had listed by using a rank order system as noted below.

Example #1 of rank order system.

Facility construction and builders: UTA would use facility construction and builders most often, SLCDA would use them less and then lastly, the UDOT.

Example #2 of rank order system.

Electrical: If a DBE electrical firm applied for DBE certification, the UDOT would contact the DBE firm to determine if they performed electrical work for airport runways, loop detectors for traffic signal lighting on UDOT highways, or railway work for UTA. The UDOT would then apply the rank order system and direct the application accordingly.

Should there be a number of applications come in simultaneously, the UDOT would disperse the applications evenly, using the rank order system, so as to not overwhelm one agency with an abundance of applications.

Disputes would be settled by a UUCP certifying entity majority vote. All three UUCP certifying entities would meet either by conference call or in person and discuss the dispute issue(s). There would be a vote between the three DBE Liaison Officers, and the majority votes would rule.

(5) On-Site Review.

- (a) In-state applicants. The assigned certifying entity designated to conduct the certification of the application, will conduct the on-site interview as part of the certification process. The date the on-site interview is performed will be posted to the PDBS database system. The certifying entity is responsible for bearing the cost to conduct the on-site interview. Under the Agreement, this cost is not reimbursable to the certifying entity.
- (b) **Out-of-state applicants**. A firm requesting certification from outside of the state must:
 - Be certified in their home state;
 - Provide a copy of the current certification letter issued by the home state UCP;
 - Complete a new uniform certification and apply directly to the UUCP; and
 - Provide a copy of the home states on site interview.
- (6) UUCP DBE Directory. An electronic version of the UUCP DBE directory will be posted on the UDOT's home page on the Internet and will be updated as changes are made. On or before October 1st of each year, a hard copy of the UUCP DBE directory will be published annually to every governmental agency in the State that receives federal funding.

(7) Certification Decision.

(a) Once the UUCP DBE application is transferred, the assigned certifying entity will check the application for required documentation against the application checklist and make a

- preliminary evaluation to determine whether the required documents are included with the application.
- (b) The assigned certifying entity will send the applicant a letter indicating that the UUCP has received the application and notify the applicant of the name and contact information of the certifying entity. If the application is incomplete, the certifying entity will note in the letter that the application is incomplete. The letter will also list the missing documentation and state that the evaluation of the application will be completed within 90 days of the receipt of all required documentation. If the missing documentation is not submitted within 60 days of receipt of the letter, the application will be denied.
- (c) The assigned certifying entity will keep a record of contacts made with the applicant firm (correspondence, missing items, or items needing clarification), in the UDOT PDBS database system.
- (d) The assigned certifying entity will complete the evaluation process, perform the on-site (if the applicant is in the State of Utah) and make a final decision on behalf of the UUCP, notify the applicant of the decision and document the decision in PDBS (which subsequently updates the DBE directory).
- (e) If the applicant is denied, the certifying entity will notify applicant of his or her right to appeal the decision to the USDOT by providing the federal regulation that allows for an appeal, the address of the federal agency to which the appeal must be sent, and the amount of time during which an appeal can be filed.
- (f) If the denial is appealed, the certifying entity will send the DBE certification decision and a copy of the DBE file to the UDOT, which will forward the file to USDOT.
- (g) Firms already certified with one of the certifying entities at the time the UUCP is implemented will be grandfathered into the UUCP.
- (h) All certifications by the UUCP shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(8) Recertification/Review Decisions.

- (a) Grandfathered firms must re-apply to the UUCP for recertification as follows:
 - Firms that have been certified under the requirements of 49 CFR 26 for less than three (3) years must apply for recertification no later than three (3) years after the anniversary date of their most recent certification.
 - Firms that have been certified under 49 CFR 26 and have had their certification extended beyond three (3) years by filling out the annual affidavit of no change, must re-apply with the UUCP no later than the next anniversary date of their most recent certification.
- (b) The certifying entities will complete an on-site review whenever recertification/review takes place (every 3 years).

(9) Annual Updates.

- (a) The certifying entity that performed the original certification work will process the Affidavit of No Change (also referred to as the "Annual Update") annually. The annual update request will be mailed on the first workday of the month before the anniversary of the DBE's certification, with a 30 day response period. The date of mailing will be posted in PDBS.
- (b) If the Annual Update is complete, with no changes, the certifying entity will post the information on PDBS and notify the DBE firm in writing that its Annual Update has been approved and they can continue in the DBE program until its next anniversary date.
- (c) If the annual update is received and is missing documentation or needs clarification, the DBE firm will be notified in writing of the missing documentation or clarification that was needed.
- (d) If a DBE firm fails to complete their annual update by their anniversary date, the DBE will receive a letter by the certifying entity stating it will be starting the decertification process if they do not respond within 30 days.
- (e) All correspondence will be noted into PDBS.

(10) **Correspondence**. All letters to applicants from the certifying entities will include at the top of the first page of any correspondence from that entity that relates to a certification, a UUCP logo agreed upon by the certifying entities or, if such logo is not agreed upon, a title referencing the UUCP.

(11) Record Keeping.

- (a) Each certifying entity will retain active records for the certifications conducted by that certifying entity.
- (b) Inactive records will be retained by the certifying entity for as long as required under state or federal law, but in no event less than 3 years.
- (12) **Training**. The certifying entities of the UUCP will meet bi-annually to review the processes of the UUCP, and make changes as necessary for the operation of the UUCP.

Section III. Dispute Resolution & Appeals

A. Third Party Certification Complaints.

- (1) Third party complaints will be handled as described in 49 CFR Part 26 (refer to Section 26.87(a), Ineligibility complaints) as listed below.
 - Any person may file with the UUCP a written complaint
 alleging that a currently certified firm is ineligible and
 specifying the alleged reasons why the firm is ineligible. The
 UUCP is not required to accept a general allegation that a
 firm is ineligible or an anonymous complaint. The complaint
 may include any information or arguments supporting the
 complainant's assertion that the firm is ineligible and should
 not continue to be certified. Confidentiality of complainants'
 identities will be protected as provided in §26.109(b).
 - The UUCP will review its records concerning the firm, any material provided by the firm and the complainant, and other available information. The UUCP may request additional information from the firm or conduct any other investigation that the UUCP deems necessary.
 - If the UUCP determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, the

UUCP must provide written notice to the firm that they propose to find the firm ineligible, setting forth the reasons for the proposed determination. If the UUCP determines that such reasonable cause does not exist, the UUCP will notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause will specifically reference the evidence in the record on which each reason is based.

B. Contractual Disputes Between UUCP Participants (including Recipients).

- (1) Financial disagreements are processed through the UDOT (even in cases where the UDOT is a party to the disagreement).
- (2) The UDOT's finance department administers reimbursements under the UUCP.
- (3) the UDOT will host the meetings between affected parties.
- (4) If the certifying entities do not agree on a solution to the problem, the complaining party is encouraged to address the problem by submitting the dispute in writing to the chief executive officers of the UDOT, UTA, and SLCDA, and by depositing the submission with an overnight carrier service for delivery to the others at the addresses set forth in the Agreement. If the complaining party chooses to pursue this informal review, the submission will state the factual grounds for the dispute, and summarize any general legal issues. The three chief executive officers will arrange for a facilitation meeting within 30 days after the date when the submission is deposited for overnight delivery, and will participate in this facilitation meeting. The three chief executive officers may pursue the facilitation process as they determine. If the matter is not resolved within one-hundred twenty (120) days after the submission was deposited for overnight delivery, then the complaining party will pursue legal action if and in the manner it deems appropriate.

C. Denial and Decertification - Appeals by UUCP Applicants

(1) Certification denials are first handled within the UUCP in accordance with 49 CFR Part 26. (See Section 26.86 and 26.87). The certifying entity will provide a written response detailing the reasons for the denial and specific timeframe for reapplication. Final determinations may be administratively appealed to USDOT in accordance with 49 CFR Part 26, Section 26.89. (2) Decertification procedure shall include the following:

Decertifications are first handled within the UUCP in accordance with 49 CFR Part 26. (See Parts 26.86 and 26.87). The certifying entity will provide a written response detailing the reasons for the decertification. Final determinations may be administratively appealed to USDOT in accordance with 49 CFR Part 26, Section 26.89.

• Hearings: When the UUCP notifies a firm that there is reasonable cause to remove its eligibility, the UUCP will give the DBE firm an opportunity for an informal hearing. The UUCP will allow the DBE firm 10 business days from the date the notification letter is received by the DBE to schedule an informal hearing, or provide the requested documentation to prove why it should remain certified. If a hearing is scheduled, at the time of the hearing the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

In such a proceeding, the UUCP will bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards.

The UUCP will maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, the UUCP will provide a transcript of the hearing to DOT and, on request, to the firm. The UUCP will retain the original record of the hearing.

- Separation of functions: The UUCP will ensure that the
 decision in a proceeding to remove a firm's eligibility is made
 by an office and personnel that did not take part in actions
 leading to or seeking to implement the proposal to remove
 the firm's eligibility and are not subject, with respect to the
 matter, to direction from the office or personnel who did take
 part in these actions.
 - (a) The UUCP's method of implementing this requirement has been made a part of each certifying entity's DBE program and is recorded in the UUCP Operating Procedures.
 - (b) The UUCP decision maker(s) will be a panel comprised of two of the UUCP certifying officials. The

UUCP has determined that the certifying officials would be the persons who would be the most knowledgeable about the certification requirements of the UUCP.

(3) The certifying entity is not precluded from correcting a decision that was based on an administrative or clerical error of the certifying entity, or a decision that the certifying entity subsequently determines is contrary to federal law or regulations. Any such correction will be made after notification to the other certifying entities.

Section IV. Working with UCP Programs and Recipients in Other States

- A. (1) The UUCP will make an independent certification decision based on Documentation provided by the home state UCP, augmented by any additional information the UUCP may require the applicant to provide. (See 49 CFR Part 26.83).
 - (2) The UUCP will share information with other UCPs and handle requests for information strictly according to 49 CFR Part 26.83 (g) & 26.109.

25. DOT/SBA MOU (49 CFR 26.84)

The UUCP will process SBA 8(a) certified firms applying to become DBEs as follows:

Procedure for SBA 8(a) Applicant:

- 1. SBA Participant must prepare a letter and send it to SBA requesting their 8a application be sent to the UUCP. In the letter, the applicant would need to specify what type of work they perform.
- 2. SBA Participant must also send a copy of the letter to the following address, or fax to (801) 965-4101.

Utah Unified Certified Program
Utah Department of Transportation
Civil Rights Section/UUCP
4501 South 2700 West – 4th Floor
Box 141520

Salt Lake City, UT 84114-1520

- 3. When the letter is received by the UUCP from the SBA Participant, it will be given to the appropriate UUCP Certifying Official.
- 4. The UUCP Certifying Official will determine if the type of work the SBA Participant performs will fit the DOT program.
- 5. If the type of work the SBA Participant performs fits the DOT program, the UUCP Certifying Official will then write a letter to SBA requesting a copy of the application (and all documents that were initially submitted with the application)

If the type of work the SBA Participant performs does not fit the DOT program (the firm does not provide products or services that is used in the DOT-assisted program or airport concessions), the UUCP Certifying Official would write a letter to the SBA Participant explaining that they were being denied because their type of work did not fit the DOT program (the regulations would be quoted). The Participant will also be notified that they can make an administrative appeal to the USDOT.

6. A copy of the letter would be sent to SBA.

26. Monitoring Payments to DBEs

The UDOT will require prime contractors and subcontractors to maintain records and documents of payments to DBE subcontractors and lower tier subcontractors for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the UDOT or DOT. This reporting requirement also extends to any certified DBE subcontractor.

The UDOT will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

27. Reporting to DOT

The UDOT will report participation to DOT as follows:

FHWA - The UDOT will report DBE participation on a **semi-annual** basis (49 CFR 26.37(b), using the DOT reporting Form.

FAA – The UDOT will submit annually the DOT DBE reporting Form, as modified for use by FAA recipients.

FTA – The UDOT will report DBE participation on a semi-annual basis, using DOT reporting Form.

28. Confidentiality

The UDOT will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local laws.

DBE information is classified as personal under Utah's Government Records Access Management Act (GRAMA).

Notwithstanding any contrary provisions of state or local law, the UDOT will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the submitter.